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MHR Connections

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THE MANITOBA HUMAN RIGHTS COMMISSION

LA COMMISSION DES DROITS DE LA PERSONNE DU MANITOBA

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Equality of Opportunity and Freedom from Discrimination

Earlier this month the Manitoba Human Rights Commission hosted a round table discussion on bias-free policing. This was the first in a series of community meetings, which are a part of a project called Racialized Communities and Police Services (RCAPS). The Commission and the University of Winnipeg are working together on this project. Representatives from such organizations as African Community Organizations of Manitoba Inc., Centennial Neighbourhood, Ka Ni Kanichihk, and United Against Racism "Aboriginal Youth Centre" were present. Winnipeg Police Chief Jack Ewatski also attended. More details on this project will be available in the coming months.

Manitoba Human Rights Commission Forced to Defend Pasternak Decision in Court

The Manitoba Human Rights Commission will defend a recent human rights ruling that high school girls should be allowed to try out for the boys' hockey team at their school, whether or not the school has a girls' team. The Manitoba High Schools Athletic Association filed court documents on October 20, 2006 asking the Manitoba Court of Queen's Bench to review and overturn the decision.

The Association has not yet provided its legal grounds for the judicial review. In defending the Pasternak decision, the Commission will do whatever it can to have the court matter resolved on a timely basis.

Adjudicator M. Lynne Harrison had already ruled in June, in response to a preliminary challenge to her jurisdiction, that the Human Rights Code applies to the activities of the Association. In her ruling on the complaints released on September 22, 2006, Adjudicator M. Lynne Harrison wrote that the Manitoba High Schools Athletic Association's rule barring girls from trying out for their high school boys' hockey team was unreasonable sex discrimination that violated *The Code*.

Dianna Scarth, Executive Director of the Commission, has reviewed the decision with the Commission's legal counsel. Ms Scarth said that the decision is very carefully reasoned and comprehensive. "It is based solidly in the law and the evidence presented at the hearing," she said.

The Rights Connection
by Janet Baldwin - Chairperson

Canning Sales to Minors

A "Spray Paint Action Plan" was recently announced by Winnipeg Mayor Sam Katz. It proposes a bylaw which would prohibit the sale of spray paint to minors and the possession of spray paint in public areas by anyone under the age of 18.

The problem with such anti-graffiti by-laws, teen curfews and similar measures (apart from questions as to their constitutionality) is that they discriminate on the basis of age. The Human Rights Code prohibits unreasonable discrimination based on protected characteristics including age, in the provision of services and contracts available to the public.

Spray paint is used for tagging and graffiti by those both younger and older than age 18, and it is also a product used to paint bicycles and banners, art projects and mailboxes. While policing services and the maintenance of public areas are responsibilities of the City, and this bylaw is probably proposed in a belief that it will aid in the provision of these services, I am less sure that the City could demonstrate that such a restriction on minors is reasonably necessary.

When the parliament of New South Wales debated the "Display of Paint Cans Bill", a follow-up to its law prohibiting the sale of spray paint to minors, one member speculated that alienation was behind graffiti art, observed that tagging (writing one's name or gang affiliation in stylized letters) was mostly done with markers, and doubted that markers would be banned next. Another member said that when he had studied the Roman catacombs, he saw graffiti carved in the soft rock in about 350 AD, which read: "Some Celts were here". Whether a form of art, a record of passing, property vandalism or a message of protest, it is clear that graffiti is an enduring phenomenon.

Measures such as the proposed graffiti by-law can fail to respect the dignity and worth of young people – often at the very time youth are becoming keenly aware of issues of justice, democratic freedoms and equality rights. Let's not ignore this harm as we look at measures that might be undertaken to abate graffiti.

Beware the floodgates argument

by Elliot Leven - MHR Commissioner

In a recent case about the Canadian Charter of Rights and Freedoms, a Quebec judge referred to the "floodgates argument" as typically the argument of last resort in Charter litigation. The same might be said for human rights litigation.

Typically a human rights complainant (often an employee) requests the respondent (often an employer) to make some change to the status quo. Sometimes the respondent resists making even the slightest change, and argues that the adjustment would "open the floodgates" to a vast number of further demands for radical changes to the status quo.

In Manitoba, the media recently reported about a human rights decision involving two sisters who wanted to try out for an all-male high school hockey team. Young women had never been allowed to try out for the team before. In letters to the editor about the decision, floodgates arguments abounded. If these two young women were allowed to try out for their high school team, some letter-writers argued, the very foundations of male and female athletics would crumble. There would be a torrent of men trying to compete against women, and women trying to compete against men. The result would be certain chaos.

In fact, after a human rights adjudicator ruled in favour of the two young women, they tried out for the boys' hockey team, but failed to make the team. The high school hockey system has not crumbled. Women's sport has not been thrown into chaos.

One cannot help but wonder how things might have played out differently if the high school hockey association had shown a little bit of creativity in dealing with the two young women. For example, what if the association had reacted to the request by the sisters by saying something along these lines: "This has never been done before. We're not sure what all the repercussions might be. However, why don't we try it for one year only in one high school? When the year is over, we will see what actually happened, and re-evaluate at that time."

Perhaps, if the association had taken such an approach, the human rights complaint, the legal expenses, and the unnecessary media frenzy could have been avoided altogether.

One thing is certain: Manitoba employers, landlords and public service providers will be faced with many more proposals to change the status quo in the years to come. When they are, for their own sakes and for the sake of the community at large, I urge them to respond with as much flexibility and creativity as they can muster. Above all else, I urge them to avoid the trap of the floodgates argument.

An adjudicator finds that refusing to allow a boy to play hockey was reprisal

An independent, government appointed adjudicator has determined that the actions of a Brandon youth hockey association amount to reprisal under Section 20 of The Human Rights Code. Section 20 prohibits retaliation by denying another person a benefit, hurting that person in some way or threatening to do so, because that person has filed or may file a human rights complaint or otherwise participated in human rights processes.

In her ruling released on October 16, 2006, Adjudicator M. Lynn Harrison wrote that the Brandon Youth Hockey Association (BYHA) violated *The Code* when it refused to let a 13 year old boy play hockey for any of its teams, because his father, Hank Richard had an active human rights complaint against the organization. Mr. Richard filed a human rights complaint on behalf of his son against BYHA with respect to the allocation of ice time, alleging that his son had been discriminated against on the basis of his ancestry. This original complaint was subsequently dismissed by the Manitoba Human Rights Board of Commissioners on the basis that there was insufficient evidence to support it.

Although the BYHA denied that its actions were based on reprisal, Adjudicator Harrison disagreed and ordered that the BYHA pay the sum of $2,000.00 to Mr. Richard in trust for his son to compensate him for injury to dignity, feelings and self-respect. She also ordered that the BYHA refrain from refusing to register players, and from transferring players, on the basis of complaints under The Human Rights Code.

Sexual harassment ruling upheld – again

The Manitoba Court of Appeal has upheld a Court of Queen's Bench decision involving a sexual harassment case. In October 2005, Madame Justice Colleen Suche rejected the argument that the procedure followed by the Manitoba Human Rights Commission during a hearing, was unfair to the respondent. Thorvaldson Care Homes Ltd. filed an appeal of Madame Justice Suche's decision and raised the same procedural issues before the Manitoba Court of Appeal.

Thorvaldson Care Homes Ltd. had alleged that during a human rights hearing in March 2002, Adjudicator Peltz relied on hearsay evidence and that the Commission had failed to disclose certain documents. Madame Justice Colleen Suche had found that Adjudicator Peltz had taken care not to rely on hearsay evidence and that the Commission was not required by law to disclose all documents in its possession as long the respondent had sufficient information to know the case against him. Madame Justice Suche dismissed, with costs, the application for judicial review by Thorvaldson Care HomesLtd.

The Manitoba Court of Appeal heard the argument presented on behalf on Thovaldson Care Homes Ltd. again on October 13, 2006 and immediately dismissed it with costs, indicating that there was no merit to any of the grounds of appeal.